UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SEVENTH REGION

THE AMERICAN NATIONAL RED CROSS, GREAT LAKES BLOOD SERVICES REGION and MID-MICHIGAN CHAPTER,

Respondent ANRC – Region Respondent ANRC – Chapter,

and	Cases 7-CA-52033	3
	7-CA-52288	3
LOCAL 459, OFFICE AND PROFESSIONAL	7-CA-5254	4
EMPLOYEES INTERNATIONAL UNION, AFL-CIO,	7-CA-52811	1
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1	Cases 7-CA-52282	2
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LOCAL 580, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	7-CA-5248′	7
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Charging Union Teamsters.

RESPONDENTS' RESPONSE TO EXCEPTIONS FILED BY THE GENERAL COUNSEL AND OPEIU LOCAL 459 TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

Submitted by:

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I. STATEMENT OF THE CASE

On May 5, 2011, Administrative Law Judge Jeffrey D. Wedekind issued his Decision and Order in the instant case. On June 30, 2011, Charging Party Office and Professional Employees International Union, Local 459, AFL-CIO ("OPEIU") and Counsel for the Acting General Counsel ("General Counsel") filed exceptions to the Decision and Order along with briefs in support of the exceptions. Pursuant to Section 102.46 of the National Labor Relation Board's Rules and Regulations, Series 8, as amended, Respondent Mid-Michigan Chapter ("Respondent Chapter" or the "Chapter") and Respondent Great Lakes Blood Services Region ("Respondent Region" or the "Region") of the American National Red Cross ("ANRC") file this Answering Brief opposing the exceptions.

II. ARGUMENT

A. THE ALJ DID NOT ERR BY FINDING THAT THE CHAPTER AND THE REGION DID NOT VIOLATE SECTION 8(A)(5) OF THE ACT BY ELIMINATING PARTICIPATION IN THE DEFINED PENSION BENEFIT PLAN FOR NEW HIRES IN THE CHAPTER CLERICAL/WAREHOUSE UNIT AND THE TEAMSTERS APHERESIS AND MUA UNITS AND BY FINDING THAT THE REGION DID NOT VIOLATE SECTION 8(A)(5) OF THE ACT BY CHANGING THE 401(K) SAVINGS PLAN'S MATCHING CONTRIBUTION FOR THE TEAMSTERS APHERESIS AND MUA UNITS

The General Counsel and OPEIU focus their exceptions on the issue of contractual waiver arguing that under extant Board law, absent evidence to the contrary, contractual waivers do not extend beyond expiration of a collective bargaining agreement and, therefore, cannot act to privilege unilateral changes made during a contract hiatus. Their exceptions in this regard miss the mark given that ALJ Wedekind's decision regarding changes to the defined benefit pension plan and 401(k) Savings Plan was based on a dynamic status quo analysis, not a contractual waiver analysis. Indeed ALJ Wedekind found that provisions in the Teamsters

contracts governing the pension plan and the 401(k) plan¹ reserved "no discretion" to the Respondent Region and "for this reason, it is again unnecessary to address the parties' arguments about whether an employer may make prospective changes pursuant to a reservation-of-discretion or management rights clause that will expire with the contract before the changes are effective." (ALJD p. 23, 1. 18-20, 48-50).² ALJ Wedekind applied the same reasoning and analysis to the Chapter contract provision governing the pension plan.³ (ALJD p. 25, 1. 14-16).

The General Counsel and OPEIU's attack on the dynamic status quo analysis is equally unavailing because, again, their argument relies on contractual waiver. The General Counsel and OPEIU each point to the Board's decisions in *E.I. DuPont de Nemours and Company*, 355 NLRB No. 176 (2010) and *E.I. DuPont de Nemours and Company*, 355 NLRB No. 177 (2010), and assign to the contract language of the Teamsters and Chapter contracts a "reservation of rights" characterization that the ALJ does not.⁴ Even if General Counsel and OPEIU were

¹ The Teamsters contracts state as follows:

Section 1. The [Region] shall continue to participate in the retirement program of the National Red Cross on the same basis as present, or as hereafter may be amended by the National Red Cross.

Section 3. The [Region] agrees that bargaining unit employees will participate in any future 401(k) or 403(b) matching pension plan offered by the National Red Cross on the same basis as other employees.

² As explained in Respondents' Brief in Support of Exceptions (and contrary to the reasoning of the ALJ at ALJD p. 23, 1. 26-29), the Region maintains that the changes to the defined pension benefit plan and the 401(k) Savings Plan were made prior to the expiration of the Teamsters contracts, and thus, the Region was required to implement the changes as a matter of contract law. However, the ALJ rendered the analysis moot (whether under a waiver, sound arguable basis or contract coverage analysis) because he dismissed the allegations on a status quo and past practice theory.

³ The Chapter contract states as follows:

Section 1. The [Chapter] shall continue to participate in the retirement program of the American National Red Cross on the same basis as the present or as it hereafter shall be amended by the American National Red Cross.

⁴ Only the language included in the Region's Collections and LCD Unit contracts and the 401(k) language in the Chapter Clerical/Warehouse Unit contracts were construed by the ALJ as "reservation-of-discretion" provisions. (ALJD, p. 25, l. 18-34; p. 26, l. 25-35).

correct in that regard, Respondents respectfully maintain the *DuPont* majority wrongly limited the Board's earlier *Courier-Journal* cases⁵ to only those circumstances involving prior hiatus changes. As noted by Member Hayes in dissent:

There is nothing in the reasoning of the *Courier-Journal* decisions to support the contention that prior hiatus changes were conclusive to the outcome. The holding of the *Courier-Journal* cases, and the established precedent upon which it is based, is that parties by their actions can create a past practice authorizing an employer's unilateral action, which becomes the status quo. The logic of these decisions is that it is the creation of the practice that controls, not the timing of when the practice happened to arise.

E.I. DuPont de Nemours and Company, 355 NLRB No. 176, slip op. at 7.

The ALJ properly drew the necessary distinction and relied on evidence in the record establishing that the status quo in the Teamsters MUA and Apheresis Units, as well as the Chapter Clerical/Warehouse Unit, was established by the provisions of the expired contracts (mandating participation in the National plans, as amended) and the parties' consistent past practice of applying plan changes to members of the bargaining units, rendering the Board's dichotomy between pre- and post-hiatus changes irrelevant to the analysis. (ALJD p. 24, 1. 17-25; p. 25, 1. 9-16).

As the ALJ correctly noted, it is well established that a unilateral change in employees' terms and conditions does not violate Section 8(a)(5) if it does not alter the status quo. The proper interpretation of the expired contract language establishes that the status quo for the Chapter Warehouse/Clerical Unit and for the Teamsters MUA and Apheresis units does not arise out of a contractual waiver. The evidence in the record also establishes a long history and practice of changes made to the defined pension benefit and 401(k) Savings Plan. The

⁵ Courier-Journal (Courier-Journal I), 342 NLRB 1093 (2004) and Courier-Journal (Courier-Journal II), 342 NLRB 1148 (2004).

exceptions of the General Counsel and OPEIU should be denied and the ALJ's decision finding no violation of the Act should be affirmed.

B. THE ALJ DID NOT ERR BY LIMITING THE MAKE WHOLE REMEDY FOR ANY ALLEGED UNLAWFUL CHANGES TO PENSION, 401(K), HEALTH INSURANCE OR RETIREE HEALTH BENEFITS

OPEIU excepts to the limitation to the make whole remedy included in ALJ Wedekind's recommended Remedy and Order with regard to certain alleged unilateral changes to the defined benefit pension plan, 401(k) plan, health insurance plans and retiree health insurance benefits. In support of the exception, OPEIU relies upon the Board's recent decision in *Goya Foods of Florida*, 356 NLRB No. 184 (2011), decided shortly after ALJ Wedekind's Decision issued. Respondents submit that ALJ Wedekind's recommended Remedy and Order, whereby make whole relief is inapplicable if the Charging Parties choose to retain one or more of the alleged unilateral changes and whereby Respondents are otherwise allowed the opportunity to litigate in compliance whether restoration of the status quo ante would be unduly burdensome, is appropriate in the instant case and that OPEIU's reliance on *Goya Foods* in excepting to the Remedy and Order is misplaced.

1. Retroactive application of Goya Foods is manifestly unjust.

The Board in *Goya Foods* overruled *Brooklyn Hospital Center*, 344 NLRB 404 (2005), and similar cases decided thereafter, to the extent that they deny make whole remedial relief to employees in circumstances when a union chooses not to demand rescission of unlawfully implemented changes and restoration of the status quo ante. *Goya Foods*, 356 NLRB No. 184, slip op. at 1 (2011). In addition to overruling *Brooklyn Hospital* and its progeny, the *Goya Foods* Board determined that it was not manifestly unjust to apply the "restored policy" retroactively to the facts of that particular case. *Id.*, slip op. at 4. Consistent with the Board's traditional approach to the question of retroactivity, the Board considered "the reliance of the

parties on preexisting law, the effect of retroactivity on the purposes of the Act, and any particular injustice arising from retroactive application." *Id.*, citing *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 4-5 (2010) (quoting *SNE Enterprises*, 344 NLRB 673, 673 (2005).

Applying the three factors to determine that retroactive application was appropriate in that case, the Board relied heavily on the fact that the changes to health care plans made by Goya Foods (made December 1, 2003 and January 1, 2005) pre-dated *Brooklyn Hospital*, when extant Board law did not limit make whole relief. *Id.* The Board specifically noted that Goya Foods could not have relied on *Brooklyn Hospital* because both changes to the health insurance plans pre-dated the issuance of that decision. For the same reason, the Board saw no "particular injustice" which is "especially true given that the law we apply today was extant law when the Respondent made the unlawful changes." *Id.*

Unlike the facts relied upon by the *Goya Foods* Board in finding retroactive application appropriate, the alleged unlawful changes to the benefit plans in the instant case were made at times falling squarely within the time frame wherein *Brooklyn Hospital* was indeed extant Board law upon which Respondents could rely. Changes to the defined benefit pension plan and the 401(k) savings plan were made in April, 2009 and implemented in May and July, 2009. Changes to the retiree medical program were implemented in January and July, 2009 and changes to health insurance benefits were implemented in October, 2009 and January, 2010. Respondents should be able to rely on application of the Board law under *Brooklyn Hospital*, the law at the time of the changes which occurred years prior to the Board's decision in *Goya Foods*. Retroactive application in these circumstances will do nothing to further any financial

disincentive against commission of alleged unlawful changes that have indeed already occurred.

Retroactive application of *Goya Foods* to the facts of this case is manifestly unjust.

2. Assuming, arguendo, retroactive application of Goya Foods is appropriate, the law nevertheless also supports the appropriateness of litigating in compliance the burdensomeness of returning to the status quo ante.

Even if retroactive application of *Goya Foods* were proper, OPEIU reads the Board's decision too broadly and seeks to deprive Respondents of the opportunity afforded by ALJ Wedekind's Remedy and Order to litigate in compliance the burdensomeness of returning to the status quo ante under one of more of the plans. The Board was explicit in *Goya Foods* with respect to the extent that prior decisions concerning limitation of remedial make whole relief were overruled, stating that:

.... we overrule *Brooklyn Hospital Center*, 344 NLRB 404 (2005), and similar cases to the extent they deny make-whole relief to employees in circumstances when a union does not demand rescission of the unlawful change and restoration of the status quo plan.

Goya Foods of Florida, 356 NLRB No. 184, slip op. at 1.

The Board's decision in *Goya Foods* overrules only the limitation established under *Brooklyn Hospital* that removes availability of make whole relief should the Charging Parties decide not to demand restoration of the status quo ante and instead choose continuation of one or more of the allegedly unlawfully implemented plans. Importantly, *Goya Foods* does not go so far as to preclude Respondents from litigating in compliance whether it would be impossible or unduly or unfairly burdensome to restore the plan or plans in effect prior to the alleged unilateral changes. Each of the cases where *Brooklyn Hospital* was applied (*see, e.g.,* cases cited in *Goya Foods*, 356 NLRB No. 184, slip op. at 3, fn. 10) clearly and separately preserved a respondent's right to litigate in compliance the burdensomeness of restoring the status quo ante despite any

limitation that may have been placed on make whole relief. The *Goya Foods* Board's silence as to this right in the face of its prior decisions allowing for such compliance litigation is telling; addressing only the issue of make whole relief for employees, the Board's decision preserves to Respondents the right to litigate burdensomeness and does nothing to restrict or change that right. Respondents likewise agree with Member Hayes that it is also appropriate to allow Respondents to prove in compliance that any losses incurred by employees under one or more plans were offset by savings or additional employer contributions under other plans. *Id.*, slip op. at 4, fn. 12.

C. THE ALJ DID NOT ERR BY FINDING THAT THE REGION DID NOT VIOLATE SECTION 8(A)(5) OF THE ACT BY REDUCING THE NUMBER OF LOCAL HEALTH CARE CHOICES IN OCTOBER 2009

The ALJ identified a number of reasons for dismissing the allegations that the Region (no allegation as to the Chapter) unilaterally reduced the number of local health care options made available to OPEIU and Teamster employees. Neither the GC nor the Teamsters Union take exception to the ALJ's findings on this issue. Only OPEIU filed exceptions.

In addition to those reasons articulated by the ALJ for dismissal of these allegations, there is one additional reason for dismissal not articulated by the ALJ: no evidence was introduced as to what geographical regions were serviced by each of the local plans. While the record is clear that the same 3 local Blue Care Network ("BCN") plans that were available in 2009 were offered in October 2009 for 2010 [East-Michigan, Mid-Michigan and West-Michigan; GC Ex 12, comparison of 2009 plans to 2010 plans set forth in Ex 1, 2, &3], there was no evidence that any of the plans were available on a state wide basis in either 2009 or 2010. The record does not address, for example, whether an employee working or residing in a coverage area serviced by BCN East Michigan could have been insured under a plan such as BCN West Michigan. While there was no question that the employer was making available all three BCN

plans in both years (because it has employees working throughout the state of Michigan), the record is silent as to whether the BCN plans themselves imposed geographical limitations on those whom they would insure. (The Region attempted to introduce evidence on this issue (geographical zip code limitations, Rejected Exhibit R-135), but the GC introduced no evidence as to geographical service area boundaries that would or may have permitted employee choice among the three BCN plans.) The collective bargaining agreement did not promise all three plans would be available to all bargaining unit employees wherever located—only that the three plans would be made available "where offered." (Emphasis added.) [GC-3, Article 30, Section 1 at 39—OPEIU Collections contract; GC-4, Article 30, Section 1 at 32-33—OPEIU LCD contract]

For all the reasons articulated by the ALJ, and for the additional reason noted herein, the 8(a)(5) charge with respect to the local health care plans was properly dismissed.

D. THE ALJ DID NOT ERR BY FINDING THAT THE REGION AND/OR THE CHAPTER DID NOT VIOLATE SECTION 8(A)(5) OF THE ACT BY ENGAGING IN PROHIBITED FIXED MIND, BAD FAITH BARGAINING OVER INSURANCE, PENSION AND 401k Proposals

OPEIU (but not the GC or the Teamsters) filed exceptions to the ALJ's findings that neither Respondent engaged in bad faith, fixed mind bargaining with respect to its health insurance, pension and 401k proposals. The Exceptions, though stated to be based on both the ALJ's factual findings and the law, are really no more than OPEIU's disagreement with the ALJ as to how the law should be applied to the facts of this case. The Exceptions raise no facts or argue any law not addressed by the ALJ.

One relevant fact not mentioned by the ALJ as to the Region's and Chapter's wanting to exclude the health insurance plans from arbitration (ALJ Decision at 32, Line 20) was addressed in the testimony of both Employers' chief spokesperson – namely, wanting to exclude health

insurance from arbitration proceedings in multiple forums (the arbitration procedures contained

within the CBA and the ERISA regulated health plans). (Tr at 1516-17)

An additional relevant fact, touched on by the ALJ when referencing the fact that the

parties were still engaged in bargaining (ALJ Decision at 33, Lines 33-34), is that the

Employers' firm bargaining position to date could change, but given the nature of bargaining,

timing of any change would depend in large part on the judgment of the negotiator. When is the

time to make a concession in light of the Union's position so as to maximize any Employer

concession and reach an agreement on issues where the parties had very strongly held views?

[Tr at 1512-1513, Line 8] The Employers did have authority to make concessions. There was

no allegation, no history, or facts suggesting that the two Respondent employers were acting out

of animus or any motive other than attempting to achieve their bargaining objective of

uniformity of benefits being administered by the American National Red Cross on behalf of

multiple Chapter and Blood Service Region employers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richelle A. McCall, legal assistant in the offices of Clark Hill PLC, hereby certify that on August 4, 2011, I electronically filed the foregoing papers with the Division of Judges, National Labor Relations Board, using the NLRB E-Filing System, and that I electronically (via e-mail) served copies of same on the parties of record as follows:

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